FILED
FEB 2 3 1966
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted]2, Miscellaneous

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,
Petitioner,

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,
Respondent.

PETITIONER'S REPLY TO MEMORANDUM FOR RESPONDENT, AND PETITIONER'S SUGGESTION THAT HIS PETITION HAS NOT BECOME MOOT

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February ....., 1966

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ARGUMENT

The Judicial Council has now held three special sessions and issued three orders foundational to these proceedings.

The first session and order stripped Judge Chandler of all his judicial power. The second set this matter for a hearing. The third cancelled the hearing, reinstated Judge Chandler's authority to hear cases pending before him when the first order was filed, but continued to deny him authority to hear cases filed in his court after that date.

All three special sessions were secret and closed. All were held without notification to Judge Chandler. He does not even now know the nature of any complaints against him or who his detractors are. He was denied every element of due process.

He stands today allowed to hear out old cases assigned to him, but his judicial authority has lost its rejuvenative powers. The Judicial Council now suggests that this case is moot. In considering this suggestion, it is well to examine carefully what has happened.

At the first special session of the Judicial Council, an order issued *sua sponte* stripping Judge Chandler of all of his judicial power. The authority for this unprecedented summary action was stated to be a single statute, 28 U.S.C. § 332.

The order directed that all cases pending before Judge Chandler be reassigned to the other judges of his court and that no new cases could be assigned to him. It further directed that if the judges of his court, he included, could not agree upon the necessary redivision of the court's business, then the Judicial Council would do so, under the authority of a second statute, 28 U.S.C. § 137.

Judge Chandler challenged the Judicial Council's jurisdiction and authority by filing this action in this Court for a Writ of Prohibition and/or Mandamus. He also filed an Application for a Stay of the Judicial Council's Order. Both are still pending.

In opposing Judge Chandler's Application for Stay, the Judicial Council, through its counsel, The Solicitor General,

referred darkly to some matters on file, suggested that a third statute, 28 U.S.C. § 272(b), was also available as authority for the Judicial Council's assault upon Judge Chandler (thus tacitly charging that Judge Chandler was mentally disabled), and asserted that "public confidence in the federal judiciary would inevitably be impaired if Judge Chandler was allowed to preside over the District Court" during these proceedings. The Judicial Council also represented to this Court that the order was "entirely interlocutory in character," that the Council had "intended to permit" Judge Chandler to be heard, that "upon a request by Judge Chandler" the Council would promptly conduct a hearing, and that "at these proceedings, the Council contemplates that Judge Chandler will, if he wishes, appear before the Council."

This Court, while expressing "no opinion concerning the propriety of the interlocutory action taken" by the Council, denied the Application for a Stay "pending this contemplated prompt action of the Judicial Council."

Judge Chandler quickly notified this Court and the Judicial Council that he would neither request nor attend a hearing conducted by a body whose very jurisdiction he challenged, and he urgently renewed his application for Stay of the Council's Order.

The Judicial Council thereafter held its second secret session and issued a most bizarre "Order." A "hearing" was ordered for February 10, 1966, at Oklahoma City, but no person, including Judge Chandler, was ordered to attend. The subject matter of the hearing was not even given, but

Judge Chandler was advised he "may appear in person and with counsel and present such matters to the Council as he may deem fit."

Could it be that Judicial Councils have full power to strip federal district judges of their powers but lack the authority to order proper hearings to this end? Whatever the case, this second order was patently an invitation for Judge Chandler to institute his own destruction.

When this Court temporarily denied a Stay of the Judicial Council's first order, the other judges of Judge Chandler's court understandingly interpreted this as requiring them to comply with the Council's Order by dividing among themselves his cases. Since the first order provided that Judge Chandler was to participate in this action, he was asked by his colleague district judges to agree to a proposed written order of division.

It was at this time that Judge Chandler detected how cleverly the first order had been constructed: If he agreed to a division of his cases, it could be said he acquiesced in the Council's Order. But if he disagreed, the Council could refer to such disagreement as conferring jurisdiction upon it under the provisions of 28 U.S.C. § 137.

Since the sole issue of these proceedings is the jurisdiction of the Judicial Council, Judge Chandler wished to avoid at any cost action which might appear to cure the jurisdictional problems of the Judicial Council. After careful consideration, he concluded his best strategy required that he go along with the other district judges with respect to the assignment of new cases in his court, but that he

should stand firm and refuse to give up those cases already pending before him and moving along in the judicial process when the first order was filed. He reached this conclusion after a careful study of 28 U.S.C. § 137 convinced him such statute refers only to newly filed cases and not to cases already assigned to judges.

Soon thereafter, a third secret and special session was held by the Judicial Council, and a third order was issued. This order cancelled the hearing, restored to Judge Chandler his powers with respect to his old cases, noted his disagreement with his colleagues with respect to these old cases and cited this as its authority to divide all new cases among the other judges, and stated that the first order was superseded.

It should be noted that the Judicial Council initially proceeded against Judge Chandler under the authority of 28 U.S.C. § 332, the Judicial Council's "housekeeping" statute. But when this authority was attacked, it maneuvered over to 28 U.S.C. § 137, the Judicial Council's "peacemaking" statute. It did this by contriving an artificial disagreement over the division of cases in Judge Chandler's court. The maneuver was then used by the Council to pronounce the first order dead, and the Council refers to this maneuver as a reason for suggesting that these proceedings are moot.

These proceedings are not moot. The third order's statement that the first order is superseded is only playing with words. The events referred to in the third order—the letters written, the stands taken, the moves made—all had their birth in the first order. All is inexorably bound.

It is peculiar justice if the Judicial Council can whisk out of sight the first order and thereby moot the case whenever it feels it can advantageously settle for the battle lines of the day. The Judicial Council has only sacrificed a chess piece for position on the board.

In its phraseology and its directives, the third order was an obvious attempt to moot this case, to grasp at every jurisdictional straw, and to leave Judge Chandler as crippled as possible.

Judge Chandler and the other district judges in his court all acted under duress when they reached an agreement over the division of new cases filed in their court. On the one hand, the other judges acted only under the compulsion of the first order of the Judicial Council. This was duress. On the other hand, Judge Chandler agreed to eliminate himself from hearing new cases only to prevent any possibility of a disagreement which might bestow upon the Judicial Council the jurisdictional power it desperately needed and was seeking under the provisions of 28 U.S.C. § 137, the "peacemaking" statute of judicial councils. This, too, was duress.

Yet, the Judicial Council, in its third order, in what amounted to a legal *tour de force*, cited the disagreement over old cases as bestowing Section 137 powers upon it in order to reassign new cases.

Judge Chandler feels like Alice in Wonderland: An order issues from a Star Chamber proceeding commanding him and the judges of his court to take from him and divide among them his cases. Under this duress, they do so.

Judge Chandler, challenging the order, but under the duress of avoiding the tactical danger which lurks in the peace-keeping statute of judicial councils, submits to a division of his new cases and insists only upon retaining his old cases. The Judicial Council surveys the situation and decides to attempt an exchange of chess pieces for positional advantage: it withdraws from the struggle over old cases, cites this contrived disagreement as authority to divide new cases (over which no disagreement existed), pronounces the first order "superseded," and suggests the case is now moot.

This Court will surely recognize that the first order was the bulldozer to move Judge Chandler where he now is. The third order cements him in place, and the superseding of the first order is only sleight of hand.

The issue in this case has never changed: does the Judicial Council have authority—constitutional or statutory—to strip Judge Chandler of his judicial powers, in proceedings shocking for their absence of due process, and for reasons either unrevealed or inappropriate on their face? Judge Chandler's judicial powers today are dying on the vine. By order, maneuver and counterorder, the Judicial Council has cut the taproot of these powers.

The Memorandum for Respondent, suggesting mootness, seems to refer to the present situation as free of conflict and as a happy state of affairs altogether. Let the record show that Judge Chandler feels his dismemberment, remembers the Judicial Council to be his assailant, and recognizes the Judicial Council's third order as a replacement of troops, not a withdrawal.

Let the record also show that Judge Chandler has complete confidence this Court will not overlook the due process aspects of this case, that it will not forget Judge Chandler has never had a hearing, that the Judicial Council still proceeds as if he had no rights or has forfeited them. This Court has won an immortal place in history by its insistence that due process be always fully observed, even though a person be only a common felon.

Finally, let the record show that the Judicial Council—confident it has full power to destroy a district judge but unsure it has sufficient power to order him to a hearing—has found it necessary to try to switch power bases. 28 U.S.C. § 137 has been artificially mobilized in an effort to reinforce 28 U.S.C. § 332. This is a great move forward, for danger to the federal judiciary—the danger of a household tyrant destroying the independence of trial judges—lurks in the powers of judicial councils.

Judge Chandler is taking the liberty of attaching a personal statement to his pleading.

Respectfully submitted,

THOMAS J. KENAN

Counsel for Petitioner

February ——, 1966

APPENDIX

PERSONAL STATEMENT OF JUDGE CHANDLER

Remarks by friends of justice, both in the press and in and before the Congress, lead me to conclude I have misled some about the nature of my Supreme Court case involving the Judicial Council of the Tenth Circuit.

I am fighting the belief of some appellate judges that justice is served if they can discipline district judges, the judges who first handle cases. I do not question the honesty or ability of these judges, but I believe their sincere convictions in this matter can destroy from within the federal judiciary.

The judicial conscience is personal to the judge, and it can never be surrendered to another. But when an appellate judge can discipline a district judge, the conscience of the latter is not secure. This is because judges, like all human beings, are frail.

When an American is a party to a case before a federal district judge, that judge should feel secure to decide the case on the merits as he sees them, and not as he believes the merits would be seen by appellate authority. The power to discipline is the power to intimidate and to control. This is the peril I hope is revealed to all.

I point no fingers. I recognize that an honest difference of opinion among judges is what is here concerned. I do not consider the personal aspect of the matter. I do see a trend, though, and foresee the ultimate destruction of the independence of trial judges. I hasten to raise this alarm.

Respectfully,

/s/ STEPHEN S. CHANDLER
STEPHEN S. CHANDLER